BRUNEI REPORT

VIVIEN TEO LIAN ENG v. ANG LENG TAT

[C.A. (Rigby (President), Pickering and Leonard JJ.A.) March 7, 1977]

[Brunei — Civil Appeal No. 1 of 1976]

Probate and Administration — Powers of Probate Officer — Whether High Court has concurrent jurisdiction with Probate Officer — Probate and Administration Enactment, 1955, ss. 5, 6, 29, 50, 71, 83, 84 and 86 — Application of Laws Enactment, 1951, s.2

In this case the facts were that one Ang Kim Boey died intestate leaving a widow and seven children. Letters of administration were granted to his eldest son Ang Leng Chuan on June 23, 1958. On April 30, 1974 Ang Leng Chuan died leaving a widow and three children. Letters of administration to the estate of Ang Kim Boey deceased were then granted to the respondent, a son of the deceased. The appellant applied for letters of administration to the estate of her husband, Ang Leng Chuan but the respondent filed a caveat. The respondent then issued a writ against the appellant and the personal representatives of Ang Leng Chuan deceased asking for accounts of the property of Ang Kim Boey deceased. It was alleged that Ang Leng Chuan had failed to carry out his duties as administrator and had committed breach of his duties. The appellant applied to strike out the writ on the ground that there was no power to institute such proceedings in the High Court. The learned judge dismissed the application and the appellant thereupon appealed to the Court of Appeal.

Held: having regard to the tenor and provisions of the Probate and Administration Enactment there was no concurrent jurisdiction vested in the High Court by virtue of which the proceedings could have been instituted and therefore the appeal must be allowed, as the High Court as distinct from the Probate Officer had no jurisdiction to entertain the proceedings.

Case referred to:-

(1) *Re Sir Lindsay Parkinson & Co. Ltd. Trusts* [1965] 1 W.L.R. 372.

COURT OF APPEAL.

Humphrey Ball (*Chin* with him) for the appellant.

David Clidero for the respondent.

In the court below the following judgment was delivered on March 22, 1976:

McMullin J.: These two applications arise out of a family dispute concerning the estate of Ang Kim Boey who died intestate in 1952. His eldest son Ang Leng Chuan was granted Letters of Administration to his father's estate. The complaint which is the substance of the action now sought to be prosecuted against his widow and his estate is that, in the 19 years between the death of the elder Ang and that of his eldest son and administrator in 1974, the latter never attempted to carry out his duties as administrator and never distributed the considerable assets of the deceased to those who were entitled to them but instead assumed proprietary management of those assets in breach of trust and to his own, and his wife's, enormous enrichment at the cost of the other beneficiaries: his mother and his 4 brothers, his sister and a half-sister.

After the death of Ang Leng Chuan his younger brother, Ang Leng Tat, was granted Letters of Administration to the father's estate. He is plaintiff in this action in which he seeks to sue personally and as administrator on behalf of the other beneficiaries. Madam Ang Leng Chuan, the widow, sought to obtain administration of her husband's estate but her brother-in-law (the plaintiff) forestalled this by lodging a caveat with the Probate Officer under section 29 of the Probate and Administration Enactment, 1955. He now seeks an order of this court appointing the widow of his deceased brother to represent the estate of his late brother for the purposes of this action, invoking for that purpose the provisions of Order 15 rule 6A(4) of the English Supreme Court Rules.

To all of this the defendant, and administratrix — presumptive to the estate of Ang Leng Chuan, replies with an application to strike out the writ as frivolous, vexatious and an abuse of the court's process. Mr. Humphrey Ball who appears for the defendant contends that, as at present constituted, the action is incompetent because, he says, there is no power to institute such an action in the High Court at all. There are other objections to the form of the proceedings of a less sweeping nature but to these I will return later.

This radical proposition raises a question of considerable interest and no little difficulty. The argument goes thus: The Probate and Administration Enactment, 1955 sets up the office of the Probate Officer in substitution for the Probate Division of the High Court, such as exists in England and other common law jurisdictions, and makes it the sole forum for dealing with all questions arising out of the administration of the estates of deceased persons. The Enactment is, Mr. Ball says, a comprehensive, exclusive and exhaustive code not only for giving the basic right to apply for probate and administration of such estates but also for regulating the practice and procedure whereby such applications may be made and dealt with. Mr. Ball points to the 7 general powers given to the Probate Officer by section 6 of the Enactment and says that these constitute the full range of equitable powers necessary to deal with all questions, contentious and non-contentious, which may arise in the course of any administration. The only powers left to the High Court or any other forum, he says, are those expressly conferred by section 83 of the Enactment which enable the Probate Officer to refer a question of law to the High Court; and section 84 which gives right of appeal from decisions of the Probate Officer to the High Court and beyond that to the Court of Appeal. It is a persuasive argument but upon reflection I do not find myself convinced. There is no doubt that the basic right to Probate and Letters of Administration derives in Brunei from this Enactment. This is well attested by the short title and by the first of the explanatory notes appended at the end of the Enactment. But that law is curiously reticent on matters which one would think must have been mentioned if it is indeed to be regarded as an exhaustive procedural code and as providing the only forum for the settlement of disputes arising from deceased persons estates. Not only is there no specific provision ousting all jurisdiction other than that of the Probate Officer but there is no explicit provision for the institution of proceedings of a contentious nature at all. The words "Writ" or "Originating Summons" or the like are not mentioned. Apart from the references to the High Court and Court of Appeal

in sections 83 and 84, the word "Court" appears rarely and somewhat ambiguously and the word is nowhere defined. This is not to say, of course, that the Probate Officer is not given the functions of a court. Clearly he is but the question remains: are these powers exclusive of the originating process of the High Court? What has been said already is very much upon the negative side, indications from silence. But there are positive matters as well. The Proviso to section 5 of the Enactment excludes suits for legacies and for the distribution of residues from the Probate Officer's jurisdiction altogether and one assumes that these at least must remain with the High Court. More tellingly, there is found in section 50 an explicit acknowledgment of the originating jurisdiction of the High Court in proceedings by or against an administrator where the Probate Officer is permitted only to suggest — not to declare or to decide — merely to suggest that where, pursuant to his own powers, he revokes the grant and replaces the administrator, the action shall continue as though it has been commenced against the new administrator. The signs may not be many but they are to my mind sufficient. I do not find in the Enactment anything to oust the originating jurisdiction of the High Court in contentious Probate and administration matters.

On one point however I think that Mr. Ball is right. In reference to the caveat, to which his client objects, he drew my attention to the fact that, although specific power is given by section 29(1) of the Probate and Administration Enactment to lodge such caveats, subsection 2 of that section provides that until rules are made under the Enactment the practice and procedure relating to such caveats will, as near as may be, correspond with the practice and procedure in force in England. Similar provisions in relation to practice and procedure generally under the Enactment appear at no less than 4 places therein (sections 29(2); 51; 86 & 88.) Yet although section 85 authorizes the making of such rules by the Sultan in Council with the Sultan's approval, that rather curious formula has never been invoked and there are still no such rules in force. One would think therefore that the English practice and procedure must apply to whatever jurisdiction and powers the Probate Officer exercises. But Order 54 of the Rules of the Supreme Court made by the Chief Justice with the approval of the Sultan in 1970 under the Supreme Court Enactment of 1963, purports directly to regulate the manner in which the Probate Officer is to deal with, *inter alia*, caveats lodged in Probate and Administration proceedings and with citations served in connection with such caveats. For my part I cannot see how these provisions in the Rules can claim legitimacy, for they are not the offspring of the Probate and Administration Enactment the only authorized begetter, at the present time, of such rules. I would think that something of the same kind might be said of Order 52, or at least of those parts of it that deal with administration, if those parts are to be interpreted as proposing to regulate the procedure of the Probate Officer in the matters confided to his care under section 6 of the Enactment. Although the Probate Officer is not referred to in Order 52 the procedure is set forth for the initiating of action in respect of the 7 selfsame powers which are conferred upon him by section 6 of the Enactment and which are copied word for word in rule 1(1) of the Order. I do not think that either section 8(2) of the Supreme Court Enactment or section 13 of paragraph C of the Interpretation and General Clauses Enactment, to which Mr. Clidero has referred me, are in themselves sufficient to unravel these difficulties. He wishes to sustain the validity of Orders 52 & 54 because they support the idea that the Probate Officer is not given power by section 6 to perform the functions of a court at all so that it would follow that Probate and Administration actions will continue to be taken in the High Court. I do not think that is correct. As I have said the scheme of the Probate and Administration Enactment seems to regard the Probate Officer as performing many of the functions of a court. As Mr. Ball has said, Rules purporting to regulate the practice and procedure of the Supreme Court cannot be interpreted as withdrawing jurisdiction from the Probate Officer which in certain respects, Order 54 appears to do. By section 8(1) the judges of the Supreme Court may make rules regulating the practice of the Supreme Court. They are not there given power to make rules regulating the practice of the Probate Officer. And section 13 of the Interpretation and General Clauses Enactment does not help for the "written law under which" Order 54 was made is the Supreme Court Enactment which as I say nowhere gives such power to the judges. If they purport to make rules for a purpose which is not specifically designated in the parent Ordinance I do not see how such rules can avoid the imputation of being *ultra vires* the powers conferred by the Ordinance.

But even if Mr. Ball is right about this — as I think he is at any rate in relation to Order 54 — I do not think it assists his present application, whatever effect it may have on the later progress of the caveat proceedings. As at present advised I think the plaintiff was entitled to bring his action in the High Court and I think the procedure which was adopted is the correct one. Whether it is possible in Brunei to bring such an action, by way of writ or by way of originating summons, before the Probate Officer I would not care to say. There does not seem to be anything in the Enactment to forbid it — although if it be legitimate to read the enactment in the light of the relevant provisions of Order 54 those provisions (whether themselves legitimate or not) seem to show the mind of the legislature as being against it. However that may be there seems to me at the moment to be collateral jurisdiction in the Probate Officer and in the High Court for those matters which are covered by section 6 of the Enactment and by Order 52 rule 1(1). I would think that some clarification of the powers attaching to the office of the Probate Officer would be desirable in view of the doubt I have expressed and that it might well now be considered timely to introduce procedural rules under the Probate and Administration Enactment, to make clear to what extent, if any, the Probate Officer's powers are to run collateral with those of the High Court. So far as the present proceedings are concerned I can only say that it appears to be that there is now an action before the High Court and, I think legitimately. The relevant English procedure is to be found in Order 85 of the English Rules. Rule 2 provides for the bringing of an action to determine matters of an identical nature

with those which are given to the Probate Officer to determine under section 6 of the Brunei law, and of course identical with those set forth in rule 1 of Order 52. The commentary to the first rule (citing the case *Re Sir Lindsay Parkinson & Co. Ltd. Trusts*)[1] states that although those matters may be dealt with by originating summons yet where breach of trust is alleged the proceedings should be commenced by writ. There is no question that breach of trust at least is alleged in the present case and therefore it appears to me that there is nothing disabling the commencement of this action by writ and that, on the contrary, that is the appropriate method for the bringing of the proceedings.

As to the other objections raised to the writ I do not think they are of substance. It is said that the writ is defective in that the provisions of Order 2 rule 4 have not been complied with and this complaint is pursued upon 2 grounds. Firstly, it is said that there has been a failure to disclose the name, description and place of abode of the 2nd defendant. That is true for the very good reason that at the moment there is no Administrator of the estate of Ang Leng Chuan and no one has yet been appointed to represent that estate for the purposes of the action. The 2nd defendant, it is said, is fictitious. Secondly, it is said that no cause of action is disclosed by the indorsement to the writ or upon the claim as subsisting between the plaintiff and the 1st defendant who is sued personally. With regard to the first point it does seem at first sight a little strange that the plaintiff should, by his caveat, prevent the 1st defendant from representing the estate as administrator and then ask that she be made representative of the estate for the purposes of the action. However that to my mind is amply explained by the long background to this dispute and the fear — whether justified or not — that the 1st defendant, who is said to be now fully in command of the not inconsiderable commercial enterprises and other property built up by her former husband may, if given administration, pursue the same wayward course which he is said to have taken as administrator. I make no comment upon the propriety of this suspicion save to say that I believe it is genuinely felt. Mr. Clidero for the plaintiff primarily relies on the provisions of Order 15 rule 6A(4) of the current English Rules of the Supreme Court and upon rule 2 of the preliminary rules of the 1970 Civil Procedure Rules of Brunei. I think he is right and I do not think it matters that the English Rule was introduced only in 1973 or that it was made consequent upon special enabling English Legislation: the Proceedings against Estates Act 1970 (section 2 thereof). However it came to be there, it is now available in the body of rules which the legislature of this territory has seen fit — in many separate provisions of the local law — to adopt in-so-far as those rules can reasonably be made to fit the circumstances of Brunei. There does not appear to me to be any special impediment in the way of applying that rule to suits in the High Court here, and clearly it is a convenient manner of dealing with just such a situation as obtains in the present case. I do not therefore need to refer to the other provisions in the local law on which Mr. Clidero was relying in the alternative. Order 15 rule 6A(4) permits the court to appoint a person to represent the estate of a deceased person and permits the action to be headed in the way this action has been headed. The practice note to the English rule makes it clear that the writ may be issued even though no address of the defendant can be given at the time of the issue of the writ.

As to the final point I think I ought to say no more than that sufficient is disclosed upon the plaintiff's affidavits to justify his suing the 1st defendant in his personal capacity as beneficiary upon the allegation that she is a person who has personally intermeddled and who continues to intermeddle with assets of his father in which he is interested. Again I say nothing as to the merits of that allegation.

For those reasons the 1st defendant's application to strike out the writ and Statement of Claim must be dismissed.

The plaintiff will have an order in terms of the prayer in his summons and the costs of both applications will go to the plaintiff.

At the special request of Mr. Ball at the conclusion of the arguments I certify in chambers that the court would ask for no further argument upon any matter touching these present applications.

From the above decision the first defendant appealed to the Court of Appeal. The following judgments were delivered by the Court:

Rigby (President).: The basic and fundamental issue raised in this appeal can be summarised in one somewhat lengthy sentence: is the Probate and Administration Enactment 1955, a fully comprehensive and exhaustive code providing exclusively the practice and procedure to be followed in Brunei in all matters concerning probate and administration, both contentious and non-contentious, and vesting all powers in connection therewith, with the Probate Officer, subject to the proviso under section 5 and (subject to his powers of reference on questions of law to the High Court and for appeals from his decision to go to the High Court), or is there a concurrent or parallel jurisdiction, provided either under the Brunei High Court (Civil Procedure) Rules or the practice and procedure of the Supreme Court of Judicature in England.

The answer to the question is a great deal more complex than the question itself.

The circumstances giving rise to this problem as it now confronts the court may be relatively briefly stated. On September 10, 1952, one, Ang Kim Boey, died intestate, leaving a widow and 7 children surviving him. He left considerable property. Letters of Administration to his estate were granted on May 3, 1955, to his eldest son, Ang Leng Chuan, and a Supplementary Grant of Letters of Administration was later granted to him on June 23, 1958. On April 30, 1974, Ang Leng Chuan himself died intestate leaving surviving him a widow, Vivian Teo Lian Eng, the present appellant, and 3 children.

Consequent upon his death, on July 13, 1974, Ang Leng Tat, Ang Kim Boey's youngest son and the 6th of his children, obtained Letters of Administration to his father's estate. Ang Leng Tat is the respondent to this appeal.

Ang Leng Tat alleged that his deceased brother, Ang Leng Chuan, during the 19 years he had administered his dead father's estate, had failed to carry out his duties as administrator, had failed to distribute the very considerable assets of the deceased, had assumed proprietary management of those assets and, in breach of trust of his duties, had enormously enriched both himself and his wife, the present appellant, to the detriment of Ang Leng Tat himself and the other beneficiaries of the estate. When the appellant sought to obtain Letters of Administration of her husband's estate the respondent on July 14, 1975, lodged a caveat with the Probate Officer under section 29(1) of the Probate and Administration Enactment and later, on December 11, 1975, a further caveat. In view of the arguments raised before us, to which I will later refer, it is relevant to mention here that section 29(1) of the Probate and Administration Enactment expressly provides that:

"(2) Subject to any rules or orders made under this Enactment the practice and procedure of the court in respect of any such caveat shall, as nearly as may be, correspond with the practice and procedure in force in England."

On February 4, 1976, the respondent, suing both personally and as Administrator of his deceased father's estate, issued a writ in the High Court against the appellant as 1st defendant, and the personal representatives of Ang Leng Chuan, Deceased [the 1st defendant's late husband] as 2nd defendant.

By his Writ he asked for:

1. An account of the property of Ang Kim Boey deceased received by Ang Leng Chuan as Administrator.
2. An account of such property received by the respondent.
3 The appointment of a Receiver of the Estate of Ang Leng Chuan. [It is pertinent to observe that by that time the estate would have vested in the Probate Officer by virtue of section 18 of the Probate and Administration Enactment, pending the grant of Letters of Administration by him.]
4. If necessary, administration of the estate of Ang Kim Boey.
5. And further and other relief.

In a subsequent affidavit dated February 14, 1976, the respondent, *inter alia*, asked for the present appellant, or some other suitable person, to be appointed as Personal Representative of Ang Leng Chuan's estate for the purpose of the action, pursuant to Order 15 rule 6A of the Rules of the Supreme Court.

On March 2 the appellant entered a conditional appearance to the Writ and on the same day filed a summons, supported by affidavit, asking for the respondent's Writ and Statement of Claim to be set aside and, *inter alia*, averring that the purported joinder of the 2nd defendant was fictitious and illusory and was a contravention of Order 2 rule 4 of the Brunei High Court (Civil Procedure) Rules, 1970. On the following day, March 3, the respondent filed a summons, supported by affidavit, asking for an Order, under Order 15 rule 6A(4) of the Rules of the Supreme Court, 1965, that the appellant, or some fit and proper person, be appointed to represent the estate of Ang Leng Chuan for the purpose of the action.

On March 19, 20, and 22 these two matters were heard together by the judge sitting in chambers and the appellant's application to strike out the Writ and Statement of Claim was dismissed and the respondent's application was granted in terms. The Order dismissing the appellant's application was duly taken out by the respondent's solicitors, and it is against that Order that the appellant now appeals.

The gravamen of the argument of Mr. Humphrey Ball, who appeared both here and before the learned judge, was and is, that the entire practice and procedure governing and controlling probate and administration matters in Brunei is contained in the Probate and Administration Enactment 1955 and there is no power or provision to invoke or pray in aid either the Brunei High Court (Civil Procedure) Rules, made in 1970, or the English Supreme Court Rules, for the purpose of instituting proceedings in the High Court in relation to such matters falling within the ambit of that Enactment.

He contended that that Enactment, as its short title states, is "to provide for the due and proper administration of the estates of deceased persons."

Under the provisions of the Enactment a person designated as the Probate Officer is vested with all the powers that would normally be vested in the Probate Division of the High Court.

Section 5 enacts that:

"5. The Probate Officer shall have, subject to the provisions of this Enactment or any other written law relating to the probate and administration of the estates of deceased persons, the same powers and his grants and orders the same effect in the State, and in relation to the estates in the State of deceased persons, as the High Court in England in its probate jurisdiction."

Then comes the vitally important proviso, which is in the following terms:

"... no suits for legacies or suits for the distribution of residues shall be entertained by the Probate Officer."

Section 6 sets out very fully the general powers of the Probate Officer.

Section 71 is, in my view, highly relevant.

It enacts that whenever the Probate Officer is required by this Enactment to act in accordance with Muslim law as practised in the State or to act with the advice of the Religious Council he shall refer the matter to the Court of the Chief Kathi and shall act upon any written statement which is certified by that court to have been obtained for the purpose of that matter so referred in accordance with the provisions of section 50 of the Religious Council, State Custom and Kathis Courts Enactment of 1955.

The section makes no reference whatsoever to the High Court. It would seem to me that if there had been any intention in the legislature that the High Court should have had any concurrent or supporting original jurisdiction with the Probate Officer one would surely have expected to have found some reference in this section, or some other section in the Enactment, as to how matters affecting the interpretation or construction of Muslim law as practised in the State should be dealt with in the High Court.

Section 83 enables the Probate Officer to refer to the High Court any questions of law and section 84

permits any person aggrieved by his decision to appeal to the High Court. Subject to the proviso contained in section 5 expressly ousting his jurisdiction in suits for legacies or suits for the distribution of residues and subject to his powers of reference under section 83 of any questions of law, and subject to the right of any person aggrieved under section 84 to appeal to the High Court, it would seem to me clear that the whole purpose and intention of the Enactment was quite deliberately to substitute the Probate Officer in place of the Probate Division of the High Court and vest in him, the powers normally vested in, and exercised by, the High Court.

And this was quite deliberately done as a matter of convenience because there was no resident High Court judge. (See in this connection paragraph 7 of the Explanatory Note).

Nor am I satisfied that such powers were to be exercised by the Probate Officer concurrently with the powers normally exercised by the Probate Division of the High Court; nor that the powers of the High Court could be invoked if there was any lacuna or deficiency in the powers of the Probate Officer. If there was any such deficiency it could have been remedied by the rule-making powers conferred upon the Sultan-in-Council under section 85 — and in particular by section 85(e).

If there had been any intention to confer a concurrent or collateral jurisdiction upon the High Court, nothing could have been easier than for the Enactment to have so provided. In this context section 29(2), which I have already quoted, is, in my judgment particularly relevant.

The application of the common law of England, the doctrines of equity, together with statutes of general application already in force are introduced into, and adopted by, the existing law of Brunei by section 2 of the Application of Laws Enactment, 1951. They are, however, applied "... save in so far as other provision has been or may hereafter be made by any written law in force in the State" and subject to the proviso that "... the said common law, doctrines of equity and statutes of general application shall be in force in the State so far only as the circumstances of the State and of its inhabitants permit and subject to such qualifications as local circumstances and native customs render necessary."

In my view the comprehensive provisions of the Probate and Administration Enactment inhibit the further introduction of English law save where they expressly enable and provide in particular sections for the application of English practice and procedure. If that view be correct, having regard to the whole purpose and intention of the legislature, as indicated in the Explanatory Note annexed to the statute, of placing matters relating to probate and administration under the supervision and control of a single individual, the Probate Officer — subject to reference to the High Court on questions of law, subject also to the reference to the Court of the Chief Kathi on matters affecting Muslim law as practised in the State and subject to appeals from his decisions — it becomes unnecessary to consider whether the proviso itself would not exclude a further introduction and adaptation of English law.

I have, therefore, reluctantly come to the conclusion that having regard to the tenor and provision of the Probate and Administration Enactment there was no concurrent jurisdiction vested in the High Court by virtue of which these proceedings could have been instituted in the High Court under, and in accordance with, the Rules of the Supreme Court or the Brunei High Court (Civil Procedure) Rules. I think it singularly unfortunate that this should be so. In bygone times and with a simpler community it may well be that it was convenient to permit the administration of estates to be under the general control of a single individual, the Probate Officer, assisted by Deputy and Assistant Probate Officers. But with the tremendous growth of Brunei, both in material and economic wealth and importance and with a more complex and sophisticated community it would seem to me anachronistic in the extreme to allow such a system to continue. There is the additional and by no means unimportant and irrelevant factor that it places a very considerable and somewhat invidious burden — both in terms of additional work and, indeed, socially, — on the Probate Officer, who is in fact the Chief Registrar, that he should be called upon to carry out these additional duties in addition to his normal functions.

If my view of the law be correct I would most strongly urge the Hon. Attorney General to give urgent consideration to amending the law so as to bring such matters of probate and administration of estates (save where they concern the estate of deceased Muslims) either within the exclusive — and normal — jurisdiction of the High Court or, at least, to confer a concurrent jurisdiction in such matters on the High Court.

Indeed, this matter seems to me to be of such urgent importance that I venture to suggest that any such amendment made to the enactment should be with retrospective effect to cover matters that may be already pending.

I would accordingly allow this appeal, with costs both here and in the court below, and set aside the Order made by the learned judge on the ground that the action was wrongly instituted in the High Court of Brunei since the High Court, as distinct from the Probate Officer for the State of Brunei, had no jurisdiction to entertain these proceedings.

That really disposes of this appeal: but there were matters raised before the learned judge upon which I would venture to express my view.

Reference was made to Order 54 of the Brunei High Court (Civil Procedure) Rules, 1970.

Rule I of that Order states: "In this Order 'the Enactment' means the Probate and Administration Enactment, 1955," The Order then deals at length with matters of practice and procedure affecting probate and administration, including citations by Petitions, hearing of Petitions. Uncontested and Contested Matters.

The Order itself does of course form an integral part of the Brunei High Court (Civil Procedure) Rules.

These Rules were made by the judges of the Supreme Court [in fact the Chief Justice since he is

at the present time the only judge] with the approval of His Highness the Sultan, in exercise of the powers conferred by section 8(1) of the Supreme Court Enactment.

The learned judge in his judgment took the view that Order 54, in so far as it purported to deal with matters of probate and administration, was *ultra vires* because, to quote his own singularly apt and vivid words, it was "not the offspring of the Probate and Administration Enactment, the only authorised begetter at the present time, of such Rules."

I would entirely agree. Clearly, those are Rules which, if they require to be made at all, require to be made by the Sultan-in-Council (and I stress the words Sultan-in-Council because the present Rules are made by the Judges of the Supreme Court (the Chief Justice) with the approval of the Sultan alone) under the rule-making power expressly conferred by section 85 of the Probate and Administration Enactment.

At first sight section 86 and, indeed, section 50, of the Probate and Administration Enactment would appear to lend considerable support to the argument that the High Court does in fact have a concurrent jurisdiction with the Probate Officer in matters affecting probate and administration and, in particular, contentious matters. No Rules have in fact been made by the Sultan-in-Council under section 85.

Section 86 provides that:

"86. Until such rules have been made as aforesaid, the rules and orders in relation to matters of probate and administration in the Probate Division of the High Court of Justice in England, and the forms of proceedings in use therein, with such modifications as the circumstances may require, shall unless the Probate Officer otherwise directs, be followed and adopted in the State."

Section 50 — a somewhat curious section — provides that:

"50. Where, before the revocation of any temporary administration, any proceedings have been commenced in the High Court in its original jurisdiction by or against any administrator so appointed, the Probate Officer may order that a suggestion be made upon the record of the revocation of such administration, and the grant of probate or administration which has been made consequent thereupon, and that the proceedings shall be continued in the name of the new executor or administrator in like manner as if the proceedings had been originally commenced by or against such new executor or administrator, but subject to such conditions and variations, if any, as the Probate Officer may direct."

A combination of these two sections — and particularly section 50 — might be construed as tending to support the argument that the High Court has, indeed, a general concurrent jurisdiction with the Probate Officer in contentious matters.

But it seems to me of vital importance to stress the proviso to section 5 of the Enactment to which I have already referred. That proviso expressly enacted that the Probate Officer should have no jurisdiction in suits for legacies or suits for the distribution of residues. Those suits are expressly, or by implication, reserved for consideration by the High Court. In dealing with *such* suits, in the absence of any rules made under section 85, the High Court may apply, in accordance with the provisions of section 86, the English Rules of the Supreme Court with such modifications as the circumstances may require.

It is in *such* suits that the Probate Officer may take action as indicated in section 50.

Apart from *such* suits the Probate Officer may, as the law now stands, avail himself of *such* of the provision of the Rules of the Supreme Court as he may himself direct.

For the reasons, I have indicated above I would reiterate that, in my judgment, this appeal should be allowed.

Pickering J.A.: I am of the same opinion. The learned judge in the court below was undoubtedly influenced, and correctly so, by the very proper tendency of the courts to retain, and even in doubtful cases to assume, jurisdiction rather than to abandon or deny competence. To that end the exercise which the judge conducted was essentially a salvage operation. I have come to the conclusion with some reluctance that wnat was salvaged was raised from water beyond the off-shore limits of the High Court of Brunei.

As positive indications of the competence of the High Court the learned judge referred to the proviso to section 5 and to section 50 of the Probate and Administration Enactment 1955. The proviso to section 5 is to the effect that no suits for legacies or for the distribution of residues shall be entertained by the Probate Officer — the clear implication being that such suits must go to the High Court. Here, there is certainly a reservation to the High Court of a limited class of suits but that, as I see it, is as far as the proviso goes. It does not appear to me to point to a general jurisdiction in the High Court whether exclusive or concurrent with the Probate Officer in relation to suits regarding matters of probate and administration.

I turn to section 50 which reads:

"50. Where, before the revocation of any temporary administration, any proceedings have been commenced in the High Court in its original jurisdiction by or against any administrator so appointed, the Probate Officer may order that a suggestion be made upon the record of the revocation of such administration, and the grant of probate or administration which has been made consequent thereupon, and that the proceedings shall be continued in the name of the new executor or administrator in like manner as if the proceedings had been originally commenced by or against such new executor or administrator, but subject to such conditions and variations, if any, as the Probate Officer may direct."

Careful analysis of the section reveals that the suggestion which the Probate Officer may order to be made upon the record of the revocation is not that the proceedings be continued in the name of the new executor or administrator, but what the "suggestion" is, appears to be left in the air. This appears to follow from the words:

"may order that a suggestion be made upon the record of the revocation of such administration, and the grant of probate or administration which has been made consequent thereupon, *and* that the proceedings shall be continued, etc." (The emphasis is mine).

The proper construction of the section is, I suggest, that the Probate Officer may not only order that a suggestion be made upon the record of the revocation of such probate or administration but that he may also order that the proceedings be continued in the name of the new executor or administrator. At first sight the first three lines of the section may appear

to present more difficulty since they refer to proceedings which have been commenced in the High Court in its original jurisdiction. As we have seen however there does exist an original jurisdiction in the High Court under the provisio to section 5 and having regard to the whole tenor of the Enactment, I am satisfied that it is to proceedings commenced under that jurisdiction, rather than under a general jurisdiction, that the reference to "proceedings which have been commenced in the High Court" relates.

The learned judge found further support for his view that the High Court enjoys a concurrent jurisdiction with the Probate Officer in suits regarding probate and administration in what he termed "indications from silence". In this respect he referred to the lack of any specific provision ousting all jurisdiction other than that of the Probate Officer and a similar absence of any such provision for the institution of contentious proceedings. Undoubtedly clarity would have been assisted and doubt dispelled if such provisions had been incorporated for if a jurisdiction which has previously existed is to be ousted, plain language to that effect is always desirable. Yet in the case of an enactment which radically alters the practice and procedure in relation to matters of probate and administration and which creates a new corporation sole to deal with those matters save for expressly reserved items, the intention, as it appears to me, was clearly to oust the jurisdiction of the High Court except as to those reserved items and as to matters referred to that court by the Probate Officer under section 83 or reaching it by way of appeal under section 84.

There remains however the curious situation whereby under Orders 52 and 54 of the Brunei High Court (Civil Procedure) Rules 1970 rules exist as to probate and administration matters thereby suggesting a jurisdiction in the High Court. As to this I agree with the learned judge in the court below that these rules are *ultra vires* as being of the wrong parentage, having been enacted under Supreme Court Enactment 1963 whereas it is section 85 of the Probate and Administration Enactment 1955 which empowers the making of such rules.

Further, I agree with the learned President that not only were the rules the product of a wrong enactment but that they also emanated from the wrong body since under section 85 the rule-making body is the Sultan-in-Council whereas the Brunei High Court (Civil Procedure) Rules were enacted by the Chief Justice and approved by His Highness the Sultan not, be it noted, by the Sultan-in-Council. It follows that Order 52, in so far as it relates to administration, and Order 54 in toto are doubly invalid.

As to the judge's finding that the Rules in question were *ultra vires*, Mr. Clidero, for the respondent, has urged in effect that subsidiary legislation in Brunei can never be *ultra vires*. This he asserts is by reason of section 13(c) of the Interpretation and General Clauses Enactment 1959 which reads:

"13(c) Subsidiary legislation shall have the same force and effect and be as binding and shall be construed for all purposes as if it had been contained in the written law under which it was made."

Clearly in the present case that argument cannot prevail. For if Rules are made by a body which has no power to make them and moreover purport to be made by virtue of an enactment which contains no power in that regard, the result is clearly not legislation at all. For all that it cannot arise in this case, however, I think it well to deal with Mr. Clidero's submission for its constitutional implications are of the widest and gravest import. If counsel be right, and to take an absurd example, it would mean that if regulations were to be enacted, by a body with power to make regulations regarding children, to the effect that all babies were to be handed over for adoption at birth, that could not be challenged — presumably not even on the ground of public policy. The answer is that the section does not say that to which counsel strives. The short point is that the first test of any apparent subsidiary legislation is: Is it *intra vires* or not? If it is not, it is void and as such, it is not subsidiary legislation at all. For all these reason section 13(c) of the Interpretation and General Clauses Enactment cannot, in my view, assist the respondent.

As to the failure of section 2 of the Application of Laws Enactment, Cap. 2, to attract the English Rules because of the existence of the 1955 Probate and Administration Enactment, I agree with what has been said by the learned President. That of course does not dispose of the English Rules because by section 86 of the 1955 Enactment itself until Rules have been made by the Sultan-in-Council (and none have):

"The rules in relation to matters of probate and administration in the Probate Division of the High Court of Justice in England and the forms of proceedings in use therein, with such modifications as the circumstances may require shall, unless the Probate Officer otherwise directs, be followed and adopted in the State."

That any such application of the English Rules refers to their application to the Probate Officer and not to the High Court, follows as I see it, from the whole tenor of the legislation but specifically from the fact that the section gives the Probate Officer, and not the court or a judge thereof, the power to direct that the English Rules shall not apply. In my opinion this section does nothing to attract or infer any greater jurisdiction in the High Court than is contained in the proviso to section 5.

A further pointer to the almost exclusive jurisdiction of the Probate Officer is to be found in section 71 of the 1955 Enactment which, whilst providing for reference by the Probate Officer to the Court of the Chief Kathi in matters of Muslim law, makes no such provision for reference by the High Court, yet it can hardly be the case that the High Court would determine matters of Muslim law for itself. The inference must be that the intention was that the High Court should not be concerned.

It is Mr. Clidero's reserve contention that even if the effect of the 1955 Enactment was to oust the jurisdiction of the High Court except in regard to those matters contemplated by the proviso to section 5 thereof, the court nonetheless had jurisdiction in regard to his writ since the dispute fell within the proviso being a suit for the distribution of "residues" within the meaning of section 5. With the greatest respect I am unable to agree with that contention. The suit is not concerned with any residue. It is for the taking of

two separate accounts, for the appointment of a receiver and, if necessary, only, for the administration of the entire estate of Ang Kim Boey.

I would set aside the order of the learned judge of March 22, 1976, dismissing the appellant's application with costs and also set aside the order granting the respondent's application for an order for Accounts and the appointment of a receiver and if necessary, administration of the estate of Ang Kim Boey. The appellant is entitled to her costs here and in the court below.

In conclusion I would endorse most heartily the comments of the learned President as to the extreme undesirability of the result at which we have perforce arrived. I agree that amending legislation restoring the jurisdiction of the High Court is urgently required and that such legislation should be retrospective. For my part, I would prefer to see it rendered retrospective to the date of the coming into force of the Probate and Administration Enactment 1955, thus putting beyond doubt the legality of any suits regarding probate and administration which may have been litigated before the High Court in the meantime.

Leonard J.A.: I agree and have nothing to add save to voice my support for the recommendation made by my brothers as to the advisability of further legislation.

Appeal allowed.

MALAYSIAN REPORTS

LIM KAR BEE v. ABDUL LATIF BIN ISMAIL

[F.C. Gill C.J. (Malaya), Ong Hock Sim & Raja Azlan Shah F.JJ.) August 18 and September 24, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 24 of 1977]

Tort — Negligence — Nuisance — Steel pipes left on side of road — Injuries sustained when motorcyclist crashed into pipe — Contributory negligence — Interest on damages — Civil Law Act, 1956, s. 11.

Practice and Procedure — Damages — Interest on damages — R.S.C. 1957, O. 40 r. 11 — Civil Law Act, 1956, s. 11.

Damages — Quantum agreed — Amount not paid into court — Interest.

The respondent had claimed damages for personal injuries as a result of an accident on a road. The respondent's case was that in trying to avoid a child crossing the road about 10 feet ahead of him he swerved his motor-cycle to the left and in so doing crashed into a 32" steel pipe which had been left lying about 3 feet to 4 feet from the near side of the road for the past one or two years. The pipe had a sharp steel-rim edge exposed and that constituted, as the learned trial judge held, a potential danger to road users. As a result of the accident the left leg of the respondent had to be amputated. The case was founded on alleged negligence and alternatively on alleged nuisance. The learned trial judge held that on both issues the defendant was wholly to blame. At the hearing the appellant's counsel had admitted liability and urged contributory negligence on the part of the respondent. The quantum of damages was agreed at $35,000. The learned trial judge awarded interest from the date of the service of the writ. The appellant appealed to the Federal Court.

Held, (Gill C.J. and Raja Azlan Shah F.J., Ong Hock Sim F.J. dissenting): (1) it was the duty of the appellant when placing the pipes on the highway to consider the risk of collision as one of the factors affecting the work he had undertaken and to avoid that hazard by not placing the pipes in that particular spot for an unduly long time before work commenced and the failure to consider these factors and to reach that conclusion and having reached that conclusion to put it into effect, constituted a breach of duty;

(2) on the facts it could not be said that the respondent was partly to blame for the injury he sustained;

(3) the pipes in the condition they were constituted a danger to persons using the road and thereby constituted a nuisance and the appellants were liable for the injury caused to the respondent;

(4) the learned trial judge was correct in ordering interest to be paid from the date of service of the writ, as although the quantum was agreed, the amount was not paid into court.

Cases referred to:-

(1) *Searle* v. *Wallbank* [1947] A.C. 341.
(2) *Lavine* v. *Morris* [1970] 1 All E.R. 144.
(2a) *Gray* v. *Pullen* (1864) 5 B. & S. 970.
(2b) *Govinda Raju & Anor.* v. *Laws* [1966] 1 M.L.J. 188, 190.
(3) *Lewys* v. *Burnett* [1945] 2 All E.R. 555, 560.
(4) *J.W. Dewhurst Ltd.* v. *Ratcliffe* (1951) 101 L.J. 361.
(5) *Tart* v. *Chitty* [1933] 2 K.B. 453.
(6) *Butterfield* v. *Forrester* 11 East 60.
(7) *Levine* v. *Morris* [1970] 1 All E.R. 144, 148.
(8) *London Passenger Transport Board* v. *Upson* [1949] A.C. 155, 176.
(9) *Hay or Bourhill* v. *Young* [1943] A.C. 92, 104.
(10) *Hughes* v. *Sheppard* 163 L.T. 177, 179.
(11) *Trevett* v. *Lee* [1955] 1 W.L.R. 113, 116-117.
(12) *Farrell* v. *John Mowlem & Co. Ltd.* [1954] 1 Lloyd's Rep. 437, 439.
(13) *Dymond* v. *Pearce* [1972] 1 Q.B. 496; [1972] 1 All E.R. 1142.